United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2605
75-7088

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by:
A. SETH GREENWALD

RICHARD RHOADS, MARILYN RACER and SUSAN HESSE,

Plaintiffs-Appellees,

-against-

J. BENJAMIN McFERRAN, individually and as Director of Personnel for the New York State Department of Social Services, and SIDNEY HOUBEN, individually and as head of the Bureau of Disability Determinations, New York State Department of Social Services,

Defendants-Appellants.

B

BRIEF FOR DEFENDANTS-APPELLANTS

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Docket #74-2605
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BRIEF FOR DEFENDANTS-APPELLANTS

Questions Presented

1. Did the District Court err in granting summary judgment to plaintiffs when there were seriously disputed issues of fact as to the "public" nature of defendants' office?

2. Must defendants allow employees into an office before and after working hours for the purpose of distributing non-work materials on work desks?

3. Are plaintiffs barred from maintaining this action by raising the constitutional issue at the grievance proceeding and filing an appeal to arbitration?

4. Were defendants in contempt of the District Court's judgment allowing distribution?

Statement

This is a consolidated appeal from an order of the United States District Court, Southern District of New York, November 18, 1974 (Motley, D.J.) which (1) permitted plaintiffs to distribute union and job-related literature inside certain state offices, (2) set aside certain fines and reprimands and (3) declared a policy of prohibiting (without permission) distribution of such literature by employees inside the offices outside working hours, violated the plaintiff-employees' First Amendment rights. It is also an appeal of an order of contempt, January 30, 1975, which specifically directed defendant Houben to issue rules expressly permitting desk-to-desk distribution of such literature between the hours of 8:00-8:30 a.m. and 5:00-5:30 p.m.

While no stay is in effect and defendants-appellants are observing the judgment and order of the District Court, we sought expedited consideration of the several appeals due to the undesirable situation now prevailing in the office, and lack of control over activities therein.

Facts and Prior Proceedings

While the District Court in its opinion dated October 31, 1974 stated its version of the facts, this was based simply on its acceptance of affidavits from plaintiffs without the holding of an evidentiary hearing.

A history of the events leading up to the institution of this suit can be gleaned from the decision on the grievance, Exh. G to Complaint.

The plaintiffs, as employees of the Department of Social Services, were served with several notices of discipline pursuant to Article 33 of the State-Civil Services Employees Association (CSEA) Contract (Professional, Scientific and Technical Unit). Discipline was proposed because of violation

of office policy regarding distribution of employee organization literature. The charges were that on July 12, 1973 a flyer appeared on the desks of the employees of the Bureau of Disability Determinations in Two World Trade Center in New York. A meeting was held with plaintiffs and it was explained that distribution of such materials without the Bureau Director's consent was a violation of office policy. They were told that written permission must be sought before any distribution.

On the morning of October 11, 1973 another flyer appeared on the desks of some employees on the 29th Floor and that after working hours on that date they were observed placing the same on employees' desks on the 30th Floor without permission. See Exhibits D, E and F to complaint.

The plaintiffs filed, in pursuance of the union contract, a grievance to contest the charges. After a meeting, Mr. John P. McKenna for the Department rendered a decision. Exh. G to the Complaint.

The decision took up three points: (1) Confusion over policy, (2) lack of awareness of policy and (3) free speech under the First Amendment to the United States Consti-

tution. Since the instant action involved "free speech", the ruling on the first two points against the plaintiffs can be excluded. As to the employee's right to free speech it was held by Mr. McKenna that the office policy was not the issue at hand. It was said that it was not the policy that prevented distribution because the plaintiffs herein ignored it and distributed the flyer without any request.* The penalty was a fine of $100 each.

The plaintiffs filed an appeal to independent binding arbitration, as provided and required in the contract, but abandoned this final step after instituting the action herein.

In moving for summary judgment the plaintiffs alleged in their 9(g) statement most of these facts, adding that the World Trade Center is an "immense building", that the bulletin board is only for CSEA literature, and many employees don't eat in the State lunchroom (No. 6).

*If the defendants had actually been refused permission, then the issue of free speech, according to the grievance decision, would have been presented.

Defendants cross-moved for summary judgment and, while not disputing the plaintiffs' 9(g) statement, added (1) that the work areas where distribution was done were not public and plaintiffs were not authorized to be there; (2) employees enter and leave through one bank of elevators and there are several places where they can receive literature; (3) plaintiffs failed to properly review the fines; and (4) plaintiff Rhoads, as a union delegate, can use the bulletin board for his messages.

Plaintiffs, through their attorney, disputed the defendants' statement. They claimed that the "facts" were not relevant. However, if they were, they requested a trial. Affidavit of Eve Cary, July 2, 1974.

Thereafter, while the motions for summary judgment were sub judice, a motion for a preliminary injunction was made. In opposing the defendants (Affidavit of A. Seth Greenwald, nunc pro tunc to October 3, 1974) pointed to the presence of confidential files on the desks where plaintiffs had gone and proposed to go. Also emphasized was the lack of authority for anyone, not on official business, to be in the

offices before or after work hours. Alternative means were suggested. Finally, issues of fact, i.e. function and set-up of the State's offices, were alluded to. A hearing, to provide a full record, was seen as necessary.

Plaintiffs (Affidavit of Richard Rhoads, October 9, 1974) disputed all of the above.

Opinion Below

The District Court granted plaintiffs' motion for summary judgment and denied defendants'. The opinion cited its version of "undisputed facts". First rejected was defendants' defense that grievance and arbitration barred the instant action. Second, on the merits, the Court saw no compelling reason to restrict leaflet on "public premises" (p. 5). The Court concluded the premises were "public". Third, since appellants were not accusing plaintiffs of tampering with confidential files, the fact that files or desks are confidential did not seem very relevant. Judge Motley held there was no "extraordinary showing" of an invasion of privacy. Fourth, the District Court felt the plaintiffs' choice of a public forum* was particularly appropriate.

*n.b. -- these are vacant desks.

The Contempt Proceeding

While the defendants were preparing this appeal, they issued "guidelines" to implement the order of the Court. They provided (1) for 24 hour prior notification to the defendant Director and leaving a copy of the literature; (2) tables to distribute some near work areas; (3) one or two persons to man the tables; and (4) distribution between 8:00-8:30 a.m. (January 16, 1975).

The plaintiffs moved before the District Court to punish the defendants for contempt of the prior judgment by virtue of the issuance of the distribution guidelines. A hearing was held on January 29, 1975, at the conclusion of which Judge Motley indicated that defendant Houben was in contempt. He had until January 31, 1975 to issue new guidelines expressly permitting desk-to-desk distribution before and after working hours.

Defendant Houben has complied but he is appealing as it is contended the guidelines were in conformity with the original judgment.

POINT I

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AS THERE WERE SERIOUS DISPUTED ISSUES OF FACT AS TO THE "PUBLIC" NATURE OF THE OFFICE

While at various points in the litigation, both sides indicated that they were ready to try issues of fact, the District Judge granted summary judgment. Fortunately, we do have a hearing on the contempt*, which indicates that Judge Motley thought because there were cross-motions for summary judgment (See Min. Jan. 29, 1975, p. 10) such a disposition is appropriate. However, this is not the law.

As stated in 6 Moore's, Federal Practice, ¶ 56.13:

> "The well-settled rule is that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed."

*The 89 page transcript reflects many issues of facts. However it cannot cure the prior granting of summary judgment where facts are in dispute. It does illuminate the errors committed by the Court below.

As a catalogue of the errors of the District Court in granting summary judgment, American Mfrs. M.I. Co. v. American Broadcasting-Paramount Theatres, 388 F. 2d 272 (2d Cir. 1967), cert. denied 404 U.S. 1063, is instructive. The District Court herein, without ever taking testimony on the nature of the defendants' office at the World Trade Center (or visiting it) concluded (Opin. p. 6) it was public enough to place no restrictions on in-office distribution. Yet, Judge Motley acknowledged "that restrictions on the exercise of First Amendment rights may vary with the accessibility of the general public to the premises involved." It should be clear that the factual determination of how "public" these offices was not free from doubt. The Court below tried issues of fact, Cf. American Mfrs., id. at 279, on the motions. It drew inferences against defendants from affidavits. The function and physical set-up of the Bureau's offices (four floors) in the Trade Center is too complex a factual issue to allow summary judgment. In fact, the testimony on the contempt hearing shows the factual dispute on the right to wander, the closing of offices, and the protection of confidential files. That defendants might be unlikely to prevail at trial is not sufficient to authorize summary judgment. 388 F. 2d, at 279, ftn. 9.

See also Union Ins. Soc. v. W. Gluckin & Co., 353 F. 2d 946 (2d Cir. 1965).

As summarized in Moore's, supra, ¶ 56.13, at 2248-2249, (1) plaintiffs had the burden to show facts which are indisputable; (2) there may be no dispute as to facts warranting judgment for one party (defendants) but there may be a dispute as to facts justifying judgment for the opposite party (plaintiffs); and (3) concessions a party (defendants) may make for purposes of his motion do not carry over and support the cross-motion of his adversary.* All of the above were violated by granting to plaintiffs summary judgment.

*Thus defendants may concede, for purposes of their motion, plaintiffs work on confidential files and are not accused of improperly inspecting or hampering with files. However, if it is necessary to so prove, defendants should have the opportunity. (See Opin., p. 6).

POINT II

DEFENDANTS NEED NOT ALLOW PLAINTIFFS UNLIMITED ACCESS TO OFFICES BEFORE AND AFTER OFFICE HOURS TO PLACE NON-WORK LITERATURE ON WORK DESKS.

In placing this case in an unadulterated free speech-First Amendment context, the District Court failed to accord the State, in its proprietary function, the right to run its own offices and reasonably control the conduct of state employees thereon.

Every case cited by the decision below as indicating leafleting as communication protected by the First Amendment involve the person-to-person communication at the very heart of the First Amendment. None involve leaving unrequested flyers in private office areas. Thus, Organization for a Better Austin v. Keefe, 402 U.S. 415, 417 (1971), involved distribution of flyers to people in the street or at doors (not inside) of neighbors of the object of the petitioner's ire. Farella v. Groh, ____ F. Supp. ____ (S.D.N.Y. 1974)(74 Civ. 3200, 10-4-74) involved person-to-person distribution of union literature in a wash-up area among employees.* Tinker v.

*This decision was also by Judge Motley and preceded shortly the instant opinion which the motions for summary judgment herein were sub judice. We are informed that the matter was not really contested by the City. No appeal was taken.

Des Moines Ind. School District, 393 U.S. 503 (1969) involved silent protest via black arm-bands. Such expression of views has no real effect on school operation, or at least none was shown. Citation in the opinion below of Hanover Township Fed. of Teachers v. Hanover Community School District, 457 F. 2d 456, 460-461 (7th Cir. 1972) seems rather odd, as the Hanover decision states that not all activities of a union or its members are constitutionally protected. Economic activities of a group of persons "are not protected by the First Amendment. Such activities may be either prohibited or protected as a matter of legislative policy", Hanover, id. at 461.* In the instant case, the order concerns "union and job-related literature," specifically the type of economic activity which does not enjoy constitutional protection according to Hanover.

Even Albany Welfare Rights Organization v. Wyman, 493 F. 2d 1319 (2d Cir. 1974), cert. denied, ____ U.S. ____, 42 L. Ed. 2d 64, involves a person-to-person distribution in a

*This is the basic holding of N.L.R.B. v. Magnavox Co., infra, 415 U.S. 322 (1974). Union activities find their protection § 7 of the National Labor Relations Act (29 U.S.C. § 157). In New York, they are found in the Taylor Act, N.Y. Civil Service Law, Art. 14, §§ 200 et seq.

public waiting room. The constitutional rights may be "the subject of regulation to protect free flow of traffic and the conduct of the county's business"; id. at 1323 (emph. supplied). The decision below and contempt decision ignored this consideration. An area must be preserved for the purpose provided. In the instant case the area was for the processing of confidential files.

More important the District Court ignored the undoubted power of the State to regulate its employees' activities, even outside the office. The Government and the states can, for example, restrict First Amendment political activity of employees. The plaintiffs, we are informed, are in positions covered by the Hatch Act, 5 U.S.C. § 1501, covering state employees in federally-funded programs such as the Bureau. As such, the recognized political rights of every person are not available to plaintiffs. Such restrictions have recently been reaffirmed as constitutional. Civil Service Commission v. Nat. Assoc. of Letter Carriers, 413 U.S. 548 (1973). See also as to state social services employees, Fishkin v. U.S. Civil Service Commission, 309 F. Supp. 40 (N.D. Cal. 1969), app. dismd. 396

U.S. 278.* Similar state restrictions also are proper. Broadrick v. Oklahoma, 413 U.S. 601 (1973). The latter case clearly shows that even if a statute or rule may be applied unconstitutionally to others, the activity of plaintiffs herein, clearly violative of the rules, bars any relief.

It can be added that the above statutes in Letter Carriers and Broadrick apply to off-duty activity as well as on-duty. We cannot see how unauthorized presence in a state office outside of working hours can be constitutionally protected. Otherwise, anyone could enter state offices at any hour under the guise of exercising First Amendment rights.

Union activity is subject to the Taylor Act, New York Civil Service Law, Art. 14, §§ et seq. and as such, this Court lacks jurisdiction over the subject matter of the complaint.

As said in Pickering v. Board of Education, 391 U.S. 563, 568 (1968):

*There are political overtones in plaintiff Rhoads' flyers. See Exh. C to Compl. While simple membership in a political party is not a violation, Letter Carriers at 576, ftn. 21, 5 CFR, pt. 733.111(5), more activity is prohibited, 733.122.

> "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of speech of the citizenry in general."

Some balancing of interests, which the District Court failed to do, must be undertaken. See also Acanfora v. Board of Education, 359 F. Supp. 843, 854-855, (D. Md. 1973), aff. 491 F. 2d 498 (4th Cir. 1974), cert. denied., ____ U.S. ____, 42 L. Ed. 2d 63.

Finally, and perhaps most in point, the Supreme Court in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) has ruled that a public agency can ban, for example, political advertisements on buses of a city transit system. Emphasized was minimizing chances of abuse, appearances of political favoritism and the risk of imposing upon a captive audience. Id. at 304:

> "Lord Dunedin, in M'Ara v. Magistrates of Edinburgh [1913] Sess. Cas. 1059, 1073-1074, said, '[T]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place.'"

In the circumstances, the advertising limitation was upheld. At 304, it was said:

> "Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require."

In the instant case, desks could be added to the list above.

It has recently been said that government is not compelled by the First Amendment to permit the most effective means of expression chosen by the citizen. Vietnam Veterans Against The War, etc. v. Morton, 506 F. 2d 53, 58, ftn. 14 (D.C. Cir. 1974). Thus the alternative means of expression suggested by defendants should have been considered.

However, the decision below made eve. y office desk and the occupant thereof the unwilling recipient of plaintiffs' literature. The desks are obviously for the operation of government; not for disseminating personal communications indiscriminately.

POINT III

ORGANIZATIONAL OR UNION ACTIVITY IN AREAS CLOSED TO THE GENERAL PUBLIC IS NOT SUBJECT TO FIRST AMENDMENT PRINCIPLES.

The facts of this case, on the plaintiffs' motion for summary judgment, should have been viewed in a light most favorable to defendants. American Mfrs. M. I. Co. v. American Broadcasting, supra, 388 F. 2d at 279. Thus it cannot be disputed that the plaintiffs arrived before working hours or stayed after working hours to roam through two floors of the World Trade Center to place flyers on the desks of hundreds of employees -- while they were absent.* First Amendment rights are those of any person and we do not think that plaintiffs ever claimed any more rights than the average person to disseminate their views on the issues of the day. In that context, plaintiffs cannot persuasively advance the claim that anybody can or must be admitted to the working offices of the Bureau of Disability Benefits before 9:00 a.m. or after 5:00 p.m. to distribute literature. There are many areas where the State need not allow unregulated leafletting. One of them is the area involved here which is not open to the general public. The offices

* It should be noted that the Bureau works on disability benefits. The files are confidential and must not be exposed to persons not working on same. See Contempt minutes (p. 57).
There are approximately a 1000 employees of the Bureau.

here are not reception areas, but rather private work areas used for processing confidential data. It has been held in Adderly v. Florida, 385 U.S. 39, 47, 48 (1966) that:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use of which it is lawfully dedicated."

People do not have a constitutional right to propagandize views "whenever and however and wherever they please" id. at 48 and "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful non-discriminatory use."

The plaintiffs' desk-to-desk foray partakes of "conduct", rather than "pure speech". The former has less constitutional protection. Cox v. Louisiana, 379 U.S. 536, 555 (1965).

The leafletting involved here appears to be an internal union dispute, not involving the State, as management or supervisors of the office. There is no unlimited freedom to distribute handbills. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). If plaintiffs claim union organizational or activity rights, we cite Central Hardware Co. v. N.L.R.B., 407 U.S. 539 (1972), decided the same day as Lloyd. In union matters the State, as

well as a private person, has certain rights of property. In private employment, they are controlled by § 7 of the National Labor Relations Act, 29 U.S.C. § 157 Cf. N.L.R.B. v. Magnavox Co., ____ U.S. ____, 39 L. Ed. 2d 358 (1974). However, the simple fact is that § 7 does not apply to state public employees. In this area the New York Legislature has enacted a statute, the Public Employees' Fair Employment Act, Civil Service Law, Act. 14, §§ 200 et seq. (Taylor Law). § 209-a which defines improper practices. Thus, subd. 1(c) prohibits the public employer from favoring one group or another. This is a complicated area which is not controlled by federal law. (§ 209-a[3]). The Public Employment Relations Board (§ 205) has jurisdiction to determine disputes as to distribution of union literature. See City of New York v. Association of Laboratory Professionals (PERB ¶ 7-3008, p. 3011, 2/14/74).*

Only union or organizational activity carried on in a location generally open to the public is protected by the First Amendment. Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). States can make reasonable regulations governing the exercise of First Amendment rights on their property. Where property is not

* The Civil Rights Act, the basis for jurisdiction herein, is not the equivalent to the Labor-Management Relations Act. Hanover Tp. Fed. of Teachers v. Hanover Community School Corp., supra 457 F. 2d at 461.

ordinarily open to the public, access for purpose of exercising First Amendment rights may be denied altogether. Logan Plaza, at 320, citing Adderly.

We must emphasize that the office areas here involved are not open to the public generally or to anyone, including employees, before or after working hours. Plaintiffs' access was only for work purpose.

Of course, as employees, plaintiffs have access to fellow employees, of necessity, at lunch, office entrances, etc., and now the bulletin board. Furthermore, § 7 cases such as N.L.R.B. v. Magnavox Co., supra, have no application to public employment in New York. See Civil Service Law § 209-a(3).

Even under the N.L.R.A. distribution of literature is tested by reasonableness. N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105 (1956). The plaintiffs have not sought to restrict their activities to public areas in Two World Trade Center, but rather have invaded private areas. They can easily reach employees at the elevator banks or concourse areas of the Center. There was no proper showing that the alternative areas to distribute literature were inadequate. The District Court accepted

affidavits. The existence of alternative areas to reach employees cannot be disputed. Cf. Central Hardware Co. v. N.L.R.B., supra, 407 U.S. at 547. What the plaintiffs were really seeking (Compl. ¶ "21") is the assistance of defendants in leaving unasked-for literature on work-desks. The size of the World Trade Center does not make distribution impossible. All employees have to enter and leave the office through one bank of elevators. Desks have, in the past, been set up in the post on the 44th Floor Skylobby (which is a central point) to distribute literature. Cf. Wolin v. Port Authority of New York, 392 F. 2d 83 (2d Cir. 1968), cert. denied 393 U.S. 940. At 93-94 of Wolin, it was said the Port Authority should draw up "appropriate regulation..." (94). This reflects on the contempt herein, infra, Point V.

The plaintiffs point to a blood drive (Compl. ¶ "22") as an example of in-office distribution of leaflets but this is a semi-official activity of an obviously vital nature. Literally, lives depend on it. In addition, a blood drive is not union activity.

There has been no showing that on proper application the plaintiffs would not have been permitted to distribute literature. However, there has to be a proper place and time. Cf. Wolin, supra at 93-94. The plaintiffs admit the policy struck down as to distribution of literature, applies to "office" areas (Compl. ¶ 2), and these are not public areas. If the Court below disagreed, it should have ordered a trial.

In conclusion, the plaintiffs' complaint simply presented issues of labor relations, not the First Amendment. State law controls, Civil Service Law, Art. 14, and the complaint should have been dismissed. Reasonable regulations can be placed on this type of activity. To declare no regulations are proper was incorrect.

POINT IV

THE PLAINTIFFS SHOULD HAVE BEEN BARRED FROM MAINTAINING THIS SUIT BY THEIR RESORT TO GRIEVANCE AND ARBITRATION.

There is no doubt that the plaintiffs challenged the proposed discipline for distributing union literature without permission pursuant to the contract procedure. They presented the constitutional issue in that proceeding. There was no indication or desire to reserve the question. The matter was to terminate in binding independent arbitration. What the District Court saw as "clear" -- "they [plaintiffs] merely intended to preserve their rights to arbitration..." (Opin. p.4), is only another example of a finding of fact without trial.

Contrary to Plano v. Baker, 504 F. 2d 595 (2d Cir. 1974), we do not claim plaintiffs had to exhaust administrative remedies, but rather that once the plaintiffs raise a constitutional issue in a forum they voluntarily enter, they should be bound by the result.

The District Court relies on dicta in Alexander v. Gardner-Denver Co., 415 U.S. 36, (1974) to allow court action after arbitration. The Supreme Court there allowed recourse to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e to attempt to vindicate a charge of racial discrimination in discharge from employment after rejection by arbitration. However that this was an interpretation of § 2000-e and not 42 U.S.C. § 1983. Stress was placed on the legislative history and its according parallel or overlapping remedies against discrimination. 39 L. Ed 2d at 158, ftn. 9. Such reasoning is not applicable to a § 1983 suit. Thus res judicata applies to § 1983. Thistlewaite v. City of New York, 497 F. 2d 339 (2d Cir. 1974); Murray v. Oswald, 333 F. Supp. 490 (S.D.N.Y. 1971).* This is a proper case to apply election of remedies

* While the decision after the grievance hearing is not the judgment of a court, it could have been taken to binding arbitration and such decision can be confirmed by the New York courts.

and waiver and by the federal policy favoring arbitration of labor disputes. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) and the Steelworkers Trilogy, 363 U.S. 564, 574, 593 (1960). Undoubtedly distribution of labor union material is characteristic of a labor dispute. But to promote labor peace, the grievance and arbitration procedures are uniquely suited. To this end, the State has laid down rules as to solicitation and non-solicitation periods. It is simply impossible to have an office policy on solicitation if employees can roam at will when they please distributing literature. This is the situation the judgment appealed from presents.

There is no case citation under 42 U.S.C. § 1983 which allows such successive attacks on state law or policy in separate forums. Plaintiffs chose to raise the constitutional issue for free speech in the grievance procedure and they should be bound to that choice. This was done with the assistance of counsel of noted expertise in this area, namely the Civil Liberties Union and therefore cannot be passed of as ill-informed. This Court should hold that was a waiver and that thereby they were relegated to the grievance procedure.

POINT V

THE DEFENDANT HOUBEN WAS NOT IN CONTEMPT OF COURT.

Of course, if this Court reverses or substantially modifies the judgment below no consideration need be given to the contempt citation. It would fall of necessity as it is based on the District Court's interpretation of its prior order. However, given the language and purpose of the judgment we submit defendant was not in contempt.

From the transcript of the contempt hearing and the guideline itself it should be obvious that it never was the intent of Mr. Houben to thwart the court's prior judgment. This should have some relevance to a finding of contempt. International Union, etc. v. California State Brewers' Institute, 25 F. Supp. 870, 874 (S.D. Cal. 1938), rev'd on other gds. 106 F. 2d 871 (9th Cir. 1939).

Furthermore contempt will not be found where there is fair grounds of doubt as to violation of the court's order. Heikkila v. Barber, 164 F. Supp. 587, 597, ftn. 16 (N.D. Cal. 1958), app. dism. 308 F. 2d 558 (9th Cir. 1962). Clearly the guidelines in question were within the purpose of the judgment.

Finally, as said in Terminal R.R. Assn. v. United States, 266 U.S. 17, 29 (1924):

> "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read."

The District Court greatly expanded the judgment by virtue of the contempt order. The defendant had issued a reasonable "guideline" to enable plaintiffs to exercise the rights the District Court found them entitled to. Simply because a prior policy was declared unconstitutional is no reason other policies cannot be issued by the defendant as supervisor of a large state office.

It should be noted that generally this Court has looked with disfavor on the District Court issuing detailed instructions to state officials on how to operate a state institution. Cf. Sostre v. McGinnis, 442 F. 2d 178, 203 (2d Cir. 1971); cert. denied 404 U.S. 1049. The contempt order was nothing less than a federal judge legislating on internal office policy.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED
AND THE CONTEMPT ORDER VACATED.

Dated: New York, New York
February 10, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
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Appellants

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGELA FIORE , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. on the 10th day of February , 1975, she served the annexed upon the following named person :

Eve Cary
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Angela Fiore

Sworn to before me this
10 day of February , 1975

A. Seth Greenwald

Assistant Attorney General
of the State of New York